

### Judge Najam, cont.

Courts,” attended by judges from 22 states, the first such national conference.

He has served as a member of the Indiana Supreme Court Committee on Rules of Practice and Procedure (1995 to 2005) and the Indiana Supreme Court Judicial Technology and Automation Committee (1999 to 2005), and he represents the judiciary on the Indiana Department of Homeland Security Counter-Terrorism and Security Council.

Judge Najam is a member of the American, Indiana, and Monroe County Bar Associations, a graduate of the Indiana Graduate Program for Judges, a Fellow of the American, Indiana and Indianapolis Bar Foundations, a member of the Indiana University Maurer School of Law Board of Visitors, a member of Phi Delta Phi legal fraternity, and an

Eagle Scout.

Judge Najam and his wife live in Bloomington.

### Judge Bailey, cont.

and Technology Fellow and is a past Board Member of the Indiana Judges Association.

Currently, Judge Bailey is a member of the Supreme Court Committee on Rules of Practice and Procedure and is Chair of the Indiana State Bar Association’s Appellate Practice Section. Also, he is in his second term as a Board Member of the Indiana University McKinney School of Law Alumni Association. Additionally, Judge Bailey serves as an adjunct professor at the University of Indianapolis.

Judge Bailey was retained on the Court of Appeals in 2000 and 2010. His wife is a professor; the couple has two post college-age children.

### COURT OF APPEALS TIDBITS

■ Six of the court’s judges served in the Civil War, all as Union soldiers or officers. Judge Posey Kime, born 1896, was the first to serve in WW1.

■ Nine Court of Appeals judges have later served the Indiana Supreme Court, including current Justice Robert D. Rucker.

■ Judge Frank M. Powers served just 33 days. The longest serving judge by far is Patrick D. Sullivan Jr., at more than 16,000 days. He retired in 2007 but still serves as a senior judge.

■ One of the five original members of the court, Jephtha New, died from a self-inflicted pistol shot in 1892. His term of office was completed by his son, Willard New.

■ Another father-son pair also served on the court: Ralph N. Smith and son Russell W. Smith. An uncle-nephew pair also served: Edgar D. Crumpacker and nephew Harry L. Crumpacker.

■ Memorably named judges include Henry Clay Fox, Daniel Webster Comstock, Cassius Clay Hadley and Ira Batman.

■ Judge John C. McNutt’s son, Paul McNutt, was Indiana governor from 1933-37 and appointed two judges to the Court of Appeals.

■ One foreign-born judge attained the court: George L. Reinhard was born in Bavaria in 1843, served in the Civil War and wrote “The Common Sense Lawyer.”

■ Judge Thomas Faulconer made Indiana history when, as a Marion County judge, he opened his courtroom doors to TV and newspaper cameras for a celebrated murder trial in 1959.

■ Judge Joseph H. Shea resigned his Appeals Court seat in 1916 to become President Woodrow Wilson’s ambassador to Chile.

## COURT OF APPEALS OF INDIANA ORAL ARGUMENT AT A GLANCE NEW CASTLE HIGH SCHOOL

# Pierson, et al v. Service America Corp.

### CIVIL LAW ISSUE:

Whether genuine issues of material fact existed, such that the trial court erred in granting summary judgment.

### ORAL ARGUMENT:

Thursday, April 24, 2014  
10:30 a.m.

### APPEAL FROM:

Marion Superior Court  
The Honorable  
Robert R. Altice, Jr., Judge

### ATTORNEYS FOR THE PARTIES

#### For the Appellant

**Marc S. Sedwick** is from Sellersburg, IN. He graduated from Indiana University-Bloomington in 1996 with a double major in Economics and Political Science. Mr. Sedwick obtained his law degree from the Indiana University School of Law—Indianapolis in 2002. He attended law school in the evening while working full-time as an environmental/toxic tort claims adjuster for a multinational insurance company.

Mr. Sedwick is admitted to the Indiana Bar (2002), Kentucky Bar (2003), Hawai’i Bar (2011), and United States District Court for the Southern District of Indiana (2002), Northern District of Indiana (2002), and Central District of Illinois (2013).

Mr. Sedwick has had his own firm since 2003 and focuses on serious plaintiff injury and medical negligence cases throughout the states of Indiana and Kentucky. He has tried numerous jury trials and argued in front of the Indiana Supreme Court and Court of Appeals of Indiana.

Mr. Sedwick is married to Cherie Sedwick, DDS, has two boys, Cory (6) and Christian (2), and enjoys playing competitive tennis.

#### For the Appellee

**Michael D. Moon, Jr.**, is a partner in Barnes & Thornburg LLP’s Indianapolis office and an administrator of the Litigation Department. His practice focuses primarily on civil litigation involving product liability and commercial disputes.

His practice includes investigating and litigating matters involving fires and explosions in chemical plants, manufacturing facilities, businesses and homes. Mr. Moon’s practice also includes the defense of product liability cases alleging exposure to toxic chemicals and injury due to allegedly defective equipment, machinery, appliances and other products.

He litigates commercial disputes, premises liability matters, automobile and trucking accidents, and other types of personal injury cases. Mr. Moon serves on several teams that represent clients nationally. He has litigated cases in more than 25 states.

Mr. Moon received his B.A. in mathematics from Indiana University – Bloomington in 1993. He received his J.D. *cum laude* from Indiana University School of Law – Indianapolis in 1996. He is a member of the American Bar Association, Indiana State Bar Association, Indianapolis Bar Association and Defense Research Institute. Mr. Moon is admitted to practice in Indiana.

## Synopsis: Case No. 49A02-1307-CT-561

**T**renton Gaff was intoxicated when his vehicle struck and killed 12-year-old Tierra Rae Pierson and injured 12-year-old January Canada. Earlier in the day, Gaff had attended an Indianapolis Colts game at Lucas Oil Stadium and had consumed alcoholic beverages at a pre-game tailgate party, during the game, and at a post-game tailgate party.

(Gaff pled guilty to Operating a Motor Vehicle with a Blood Alcohol Content of 0.15 percent or Greater Causing Death, as a Class B felony.)

Separate lawsuits were filed on behalf of Pierson’s estate and Canada, alleging that Centerplate, the vendor of alcoholic beverages at Lucas Oil Stadium, had violated Indiana’s Dram Shop Act by providing alcoholic beverages to a visibly intoxicated

person and had committed common law negligence by failure to adequately train servers.

The trial court granted summary judgment to Centerplate, concluding that there was no evidence that a Centerplate designee served alcohol to Gaff while he was visibly intoxicated. The Pierson and Canada cases were consolidated for purposes of this appeal.

Pierson’s estate claims that genuine issues of material fact preclude summary judgment and the trial court did not view the evidence in the light most favorable to the non-movant as required by the Indiana summary judgment standard.

Centerplate claims that summary judgment was properly granted where Pierson’s estate cannot point to evidence that a Centerplate vendor

served an alcoholic beverage to Gaff while he was visibly intoxicated.

#### Definitions

**Negligence:** the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregarding of others’ rights.

**Summary Judgment:** a judgment granted on a claim about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law.

#### Standard of Review

Our standard of review for appeals

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Case synopsis, cont.

from summary judgment is well established:

When reviewing a grant of summary judgment, our standard of review is the same as that of the trial court. Considering only those facts that the parties designated to the trial court, we must determine whether there is a “genuine issue as to any material fact” and whether “the moving party is entitled to a judgment as a matter of law.”

In answering these questions, the reviewing court construes all factual inferences in the non-moving party’s favor and resolves all doubts as to the existence of a material issue against the moving party. The moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law; and once the movant satisfies the burden, the burden then shifts to the non-moving party to designate and produce evidence of facts showing the existence of a genuine issue of material fact.

Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267, 1269-70 (Ind. 2009) (internal citations omitted).

Applicable Law

One of Pierson’s claims is statutory; the other is based upon common law negligence.

A defendant is liable to a plaintiff for the tort of negligence if (1) the defendant has a duty to conform its conduct to a standard of care arising from its relationship with the plaintiff, (2) the defendant has failed to conform its conduct to that standard of care, and (3) an injury to the plaintiff was proximately caused by the breach.

Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C., 929 N.E.2d 722, 726 (Ind. 2010).

In negligence cases, summary judgment is “rarely appropriate.” Rhodes v. Wright, 805 N.E.2d 382, 387 (Ind.

2004).

However, a defendant is entitled to judgment as a matter of law when the undisputed material facts negate at least one element of the plaintiff’s claim. Id. at 385.

Whether there is a legal duty owed by one party to another in a negligence action is generally a question of law for the court to decide. Chandradat v. State, Ind. Dep’t of Transp., 830 N.E.2d 904, 908 (Ind. Ct. App. 2005), trans. denied.

Dram Shop Statute

Indiana Code section 7.1-5-10-15(a) prohibits sales of an alcoholic beverage to an intoxicated person:

It is unlawful for a person to sell, barter, deliver, or give away an alcoholic beverage to another person who is in a state of intoxication if the person knows that the other person is intoxicated.

Indiana Code section 7.1-5-10-15.5, addressing civil liability and defining “furnish,” provides:

As used in this section, “furnish” includes barter, deliver, sell, exchange, provide, or give away.

A person who furnishes an alcoholic beverage to a person is not liable in a civil action for damages caused by the impairment or intoxication of the person who was furnished the alcoholic beverage unless:

the person furnishing the alcoholic beverage had actual knowledge that the person to whom the alcoholic beverage was furnished was visibly intoxicated at the time the alcoholic beverage was furnished; and

the intoxication of the person to whom the alcoholic beverage was furnished was a proximate cause of the death, injury, or damage alleged in the complaint.

(c) If a person who is at least twenty-

one (21) years of age suffers injury or death proximately caused by the person’s voluntary intoxication, the:

- (1) person
- (2) person’s dependents;
- (3) person’s personal representative; or
- (4) person’s heirs;

may not assert a claim for damages for personal injury or death against a person who furnished an alcoholic beverage that contributed to the person’s intoxication, unless subsections (b)(1) and (b)(2) apply.

In Delta Tau Delta, Beta Alpha Chapter v. Johnson, 712 N.E.2d 968, 974 (Ind. 1999), our Supreme Court summarized Indiana case law regarding “furnishing” and “actual knowledge” of intoxication, as those terms appear in Indiana Code section 7.1-5-10-15.5:

The furnisher’s knowledge must be judged by a subjective standard. Absent an admission that the person furnishing alcohol had actual knowledge of the other’s intoxication, the trier of fact must look to reasonable inferences based upon an examination of the surrounding circumstances. Actual knowledge of intoxication can be inferred from indirect or circumstantial evidence such as what and how much the person was known to have consumed, the time involved, the person’s behavior at the time, and the person’s condition shortly after leaving. Where, however, there is insufficient evidence to support actual knowledge, the issue may be resolved as a matter of law. (*internal citations and quotations omitted*).

When determining whether a furnisher of alcoholic beverages knew a person was intoxicated, we look to what and how much a person was known to have consumed, the person’s behavior at the time, and the person’s condition. Ashlock v. Norris, 475 N.E.2d 1167, 1170 (Ind. Ct. App. 1985).

Appeals on Wheels

The Court of Appeals hears oral arguments across Indiana to enable Hoosiers to learn more about the judiciary’s indispensable role in Indiana government. Since its 2000-2001 centennial, the court has held more than 380 “traveling oral arguments” at high schools, colleges, law schools and other venues. This will be the court’s 14<sup>th</sup> *Appeals on Wheels* event this year.

Today’s Panel of Judges

The Honorable  
L. Mark Bailey  
(Decatur County)

**Lloyd Mark Bailey** was raised on the family farm in Decatur County. He was educated in Indiana, earning a B.A. from the University of Indianapolis (1978); a J.D. from Indiana University McKinney School of Law (1982); and an M.B.A. from Indiana Wesleyan University (1999). He also completed the graduate program for Indiana Judges. Judge Bailey was appointed to the Indiana Court of Appeals by Governor Frank O’Ban- non in 1998, after having served as judge of the Decatur County and De- catur Superior Courts.

During his legal career, Judge Bai- ley has served public interest and professional organizations in various capacities. He was the first Chairper- son of the Indiana Pro Bono Com- mission, having been awarded the Indiana Bar Foundation’s Pro Bono Publico Award and the 2002 Randall Shepard Award for his pro bono con- tributions. His writings include: “A New Generation for Pro Bono,” “Pro Bono Participation Preserves Jus- tice,” and “An Invitation to Become Part of the Solution,” all published in the *Indiana Lawyer*.

Judge Bailey also chaired the Local Coordinating Council of the Gover- nor’s Task Force for a Drug-Free In- diana and the Judicial Conference Alternative Dispute Resolution Com- mittee. Additionally, he has served on the Judicial Education Committee of the Judicial Conference of Indiana.

In 2004, Judge Bailey and his First District colleagues received the Indi- ana Bar Foundation Law-Related Education Award for their commit- ment to bringing oral arguments into community settings.

In February of 2006, he served as the Distinguished Jurist in Resi- dence at Stetson University College of Law; in 2007-08, he was the Mod- erator of the Indianapolis Bar Asso- ciation’s Bar Leader Series; in 2009, he was designated an ASTAR Science

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The Honorable  
Edward W. Najam, Jr.  
(Monroe County)

**Edward W. Najam Jr.**, was nominated and appointed to the Court of Appeals of Indiana in 1992 and was retained by the electorate in 1996 and 2006. He is presiding judge of the court’s First District, which covers all of southern Indiana.

Judge Najam graduated from the Indiana University High School in Bloomington, where he was raised, and attended Indiana University Bloomington. While at IU, he was elected to Phi Beta Kappa, elected Student Body President, and earned a B.A. in political science in 1969, With Highest Distinction. He also received the Herman B Wells Senior Recognition Award for academic excellence and campus leadership.

Judge Najam earned his J.D. from the Harvard Law School in 1972. Af- ter admission to the Bar, he was Ad- ministrative Assistant to the Mayor of Bloomington for two years and an attorney in private practice for 18 years.

He served as a member of the Civil Justice Reform Act Advisory Group and the Local Rules Advisory Com- mittee of the United States District Court for the Southern District of Indiana.

He was a member of the Bloom- ington Rotary Club, the Greater Bloom- ington Chamber of Commerce, and President of the Monroe County YMCA Board of Directors. Judge Najam is a director of the Communi- ty Foundation of Bloomington and Monroe County.

As Chair of the Appellate Practice Section of the Indiana State Bar As- sociation, he initiated the Appellate Rules Project, which culminated in a complete revision of the Indiana Rules of Appellate Procedure in 2000, the first comprehensive re- vision of the appellate rules in 30 years.

In 2001, he organized and co- chaired “Caught in the Middle: A National Symposium on the Role of State Intermediate Appellate

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The Honorable  
Melissa S. May  
(Vanderburgh County)

Born in Elkhart, **Melissa S. May** studied criminal justice at Indiana University-South Bend before earn- ing her law degree from Indiana Uni- versity School of Law-Indianapolis in 1984. She then launched a 14-year career in private legal practice in Evansville that focused on insurance defense and personal injury litigation.

Judge May moved directly from private practice to the Court of Ap- peals in 1998 and was retained by election in 2000 and 2010. Prior to this year, she served as Presiding Judge of the Fourth District, which covers all of Indiana.

Judge May has long been active in local, state and national bar associa- tions and foundations, with a particu- lar focus on continuing legal educa- tion and appellate practice. At vari- ous times, Judge May has chaired the Indiana State Bar Association’s Litigation and Appellate Practice sections and was secretary to the Board of Governors.

As chair of the Indiana Pro Bono Commission (for the public good), Judge May worked with 14 pro bono districts to train lawyers and media- tors on how to assist homeowners facing foreclosure. She also serves on an Indiana Judicial Conference Committee that translated all civil jury instructions into “plain English.”

Judge May teaches trial advocacy at Indiana University McKinney School of Law and frequently speaks on legal topics to attorneys, other Judges, schools, and other profes- sional and community organizations. She is special counsel to the Ameri- can Bar Association’s Standing Com- mittee on Attorney Specialization, on which she’s served since 2003.

In October 2011, Judge May re- ceived the Women in the Law Recog- nition Award from the Indiana State Bar Association for her dedication to helping women advance in the legal community.

She and her husband live in Mor- gan County.